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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 10/054,215 | 11/13/2001 | Bernadino Pavone | 65,160-0032 | 4634 |

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| EXAMINER |
|---|
| PRATT, HELEN F |

| ART UNIT | PAPER NUMBER |
|---|---|
| 1761 | |

DATE MAILED: 08/13/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

| Office Action Summary | Application No. | Applicant(s) | |
|---|---|---|---|
| | 10/054,215 | PAVONE, BERNADINO | |
| | Examiner | Art Unit | |
| | Helen F. Pratt | 1761 | |

*-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --*

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1)☐ Responsive to communication(s) filed on _____ .

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4)☑ Claim(s) 1-18 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☑ Claim(s) 1-18 is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

**Application Papers**

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

1) ☑ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

## DETAILED ACTION

### *Claim Rejections - 35 USC § 103*

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1, 3, 11, 12, 13, 16-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnson (6,099,889) in view of Kohler (2212634).

Johnson discloses a composition containing tomato juice, carbon dioxide as found in soda water and orange juice and vitamin C (abstract and col. 3, lines 57-65). Claim 1 differs from the reference in the use of vegetable pepper and citrus flavoring and only tomato juice. However, the orange juice contributes citrus flavoring. Nothing new is seen in another vegetable ingredient such as pepper. Attention is invited to In re Levin, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a

patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients, which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. In this case no coaction or cooperative relationship is seen in the addition of pepper, in that it contributes its known vegetable taste. Kohler discloses that it is known to add carbon dioxide to a vegetable juice (abstract). Therefore, it would have been obvious to make a composition as disclosed by Johnson and to add use only a vegetable juice as disclosed by Kohler.

Claim 3 further requires a citrus flavoring such as lemon or lime flavoring. However, the specification discloses that carbonated beverages with these flavorings are known (page 3, first para.). Therefore, it would have been obvious to use a flavored carbonated beverage in place of the soda water of Johnson for its known function of adding flavor to the composition.

Claim 11 requires up to 99% water and claim 12 requires that the tomato juice be from 10 to 99% of the beverage and claim 14 that the beverage can contain up to 99% water. Johnson discloses that water or soda water can be mixed with juices in a ratio of about 1-3, which is within the claimed ranges (col. 3, lines 56-65). Therefore, it would have been obvious to use the amounts of water disclosed by Johnson in a composition as claimed because Johnson discloses these amounts as known.

Claim 13 further requires particular amounts of ingredients. The discovery of an optimum value of a result effective variable is ordinarily within the skill of the art. In re

Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). In developing a beverage product, properties such as flavor and taste are important. It appears that the precise ingredients as well as their proportions affect the flavor and taste of the product, and thus are result effective variables which one of ordinary skill in the art would routinely optimize. Therefore, it would have been obvious to use particular amounts of ingredients in the claimed composition because In re Boesch states these are result effective variables.

Claim 16 only requires a beverage with V-C, tomato juice and CO2. Kohler discloses a beverage containing fruit juice and co2 (abstract). Vitamin C was disclosed by Johnson above (col. 2, lines 60-64). Therefore, it would have been obvious to use the particular tomato juice of Johnson as the juice of Kohler and to add carbon dioxide, as Kohler only requires a vegetable juice and carbon dioxide.

The particular amounts of ingredients as in claims 17 and 18 have been discussed above and are obvious for those reasons.

Claims 2, 4 and 5-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnson as applied to the above claims, and further in view of Little Rock Cooks (page 29).

Claim 2 further requires salt and claim 7 requires peppercorn. However, Little Rock Cooks disclose a composition containing salt and pepper, and tomato juice (page 29, first two recipes). Ground peppercorn is known to be pepper. As it is known to use salt and pepper in a tomato composition, it would have been obvious to use salt in other tomato compositions for its known seasoning effect.

Claims 4 and 5 contain known ingredients such as sugar, salt, and claim 8, onion, claim 9, garlic, and claim 10 horse radish which can be added to any composition for their known functions. In fact, Little Rock Cooks disclose the use of lemon juice, which adds an acidic flavor to the composition. Nothing new is seen in the use of vinegar, instead of lemon juice absent a showing of unexpected results in the use of vinegar. Also, see In re Levin as above. Therefore, it would have been obvious to use known food ingredients in the claimed composition for their known function.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 703-308-1978. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on (703) 308-3959. The fax phone number for the organization where this application or proceeding is assigned is 703-305-7718.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0651.

Hp 8-8-03

HF Pratt

HELEN PRATT
PRIMARY EXAMINER